

No. 5098

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN P. CARTER, formerly United States Collector of
Internal Revenue, Sixth District of California,
Plaintiff in Error,
vs.
JACOB BAUMAN,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

FILED
MAR 14 1927
F. D. MONGER

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	PAGE
Assignment of Errors.....	29
Bill of Complaint.....	5
Citation	2
Clerk's Certificate	33
Findings and Judgment.....	14
Judgment	17
Memorandum Opinion	19
Names and Addresses of Attorneys.....	1
Petition for Writ of Error.....	27
Praecipe	31
Stipulation	11
Writ of Error	3

Names and Addresses of Attorneys.

Attorneys for Plaintiff in Error:

S. W. McNABB, Esq., United States Attorney;
DONALD ARMSTRONG, Esq., Assistant
United States Attorney, Federal Building, Los
Angeles, California.

Attorney for Defendant in Error:

DANIEL J. CHAPIN, Esq., I. W. Hellman Build-
ing, Los Angeles, California.

United States of America, ss.

To JACOB BAUMAN, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 15th day of December, A. D. 1926, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause wherein you are defendant in error and John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, is plaintiff in error and you are hereby required to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK United States District Judge for the Southern District of California, this 16 day of November, A. D. 1926, and of the Independence of the United States, the one hundred and fifty-first.

Paul J McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit John P. Carter, former Collector of Internal Revenue for the Sixth District of California, Plaintiff in Error, vs. Jacob Bauman Defendant in Error. Due service of the within citation

acknowledged this 23th day of November, A. D. 1926. Dan J. Chapin attorney for plaintiff. Citation Filed Nov. 23, 1926. R. S. Zimmerman, clerk, by L. J. Cordes, deputy clerk.

United States of America, ss.

The President of the United States of America,
To the Judges of the District Court of the United States, for the Southern District of California,
GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between Jacob Bauman, plaintiff, against John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, Defendant a manifest error hath happened, to the great damage of the said John P. Carter, defendant as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 15th day of December next, in the said United States Circuit Court of Appeals, to be there and then held, that the

record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM HOWARD TAFT, Chief Justice of the United States, this 15th day of November in the year of our Lord one thousand nine hundred and twenty-six and of the Independence of the United States the one hundred and fifty-first

[Seal]

Chas. N. Williams

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R S Zimmerman

Deputy Clerk.

The above writ of error is hereby allowed.

Paul J. McCormick

Judge.

I hereby certify that a copy of the within Writ of Error was on the 23 day of November, 1926, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

R. S. Zimmerman

Clerk of the District Court of the United States for the Southern District of California.

[Endorsed]: 1804 Civ. United States Circuit Court of Appeals for the Ninth Circuit John P. Carter Plaintiff in Error vs. Jacob Bauman Defendant in Error

Writ of Error Filed Nov. 16, 1926 R. S. Zimmerman, clerk; Murray R. Wire, deputy.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN JUDICIAL DISTRICT OF CALIFORNIA.

JACOB BAUMAN, Plaintiff,)
vs.) AT LAW
JOHN P. CARTER, Former Collector)
of Internal Revenue for the Sixth)
District of California,)
Defendant.)

Comes now Jacob Bauman, the plaintiff above named, and for cause of action against the above named defendant says:

(1) That on and prior and subsequent to April 26, 1921, he was a citizen and resident of the City of Los Angeles, County of Los Angeles, State of California, residing at 947 Arapahoe Street, and was the proprietor and duly qualified wine maker of bonded winery No. 5 located at Lankershim, said county and state.

(2) That the defendant, John P. Carter, was prior to March 6, 1922, the duly appointed and acting Collector of Internal Revenue for the United States for the Sixth District of California, and was such Collector for more than four years prior thereto.

(3) That he, the plaintiff herein, during the wine season of 1920 leased said bonded winery No. 5, located at Lankershim, California, from the then proprietors, Borgia Brothers; that he thereupon qualified as the pro-

prietor and wine maker of said winery by giving the bond required under the law and regulations, and by meeting the other requirements therein provided; that among other requirements he filed with the defendant herein a plan of the winery premises, and that said plan showed a room designated as a fortifying room, which under the law and regulations was to be constructed as therein provided and was part and parcel of the bonded premises; that said room was constructed by said plaintiff and his lessors, and was thereafter examined by said defendant Carter, or his representative, and was approved by said defendant as in all respects conforming to the law and regulations; and said bond was acquired and filed and likewise approved by said defendant, the said Collector of Internal Revenue.

(4) That on or about November 14, 1920, there was stored in said fortifying room on the bonded premises of winery No. 5, nine barrels of distilled spirits designated under the name of "Grape Brandy", and containing 820.9 taxable gallons on which the Internal Revenue tax had not been paid; that this brandy had been stored in said fortifying room under the direct supervision of said Collector John P. Carter, through his duly appointed representative; and said brandy was to be used by the plaintiff herein in the fortification of pure sweet wines.

(5) That in accordance with the law and regulations governing the construction of fortifying rooms on bonded winery premises, the entrance door to aforesaid room was provided with a Government lock and seal, the key to which was at all times in the possession of

the defendant herein, or his duly appointed representative; that when the said nine barrels of brandy were deposited in said room, the entrance door was secured by defendant's representative with said lock and seal and the key to the lock was kept in his possession; and that plaintiff had no ingress to said room except by the permission and at the sufferance of said defendant or his representative.

(6) That before said brandy was used, and on or about November 15, 1920, said nine barrels of brandy were stolen from said room by parties unknown to the plaintiff and without any negligence, connivance, collusion, or fraud on his part.

(7) That this stolen brandy was not recovered and was a total loss to the plaintiff, and he has received no recompence for either the whole or a part of it.

(8) That under the provisions of Section 5, Act of November 23, 1921, (42 Stat., 222) no tax is assessable or collectible on distilled spirits lost by theft from a distillery warehouse or other bonded warehouse in the absence of fraud on part of the owner.

(9) That Sections 3221 and 3223 (20 Stat., 327) and Section 5, Act of June 7, 1906 (34 Stat., 215), extending the provisions of said sections as amended to grape brandy stored in fortifying rooms on bonded winery premises, were in effect November 14, 1920, and are now in effect and force.

(10) That the fortifying room on the aforesaid bonded winery premises was constructed and supervised in conformity with the law and regulations regarding construction and supervision of distillery warehouses

and other bonded warehouses; and it is the plaintiff's and my contention that said fortifying room was on November 15, 1920, a bonded warehouse under the provision of the law and regulations regarding bonded warehouses; and by virtue of the aforesaid acts, that any distilled spirits stored therein for fortifying purposes and lost by theft before being used for such purposes, are not subject to any unpaid internal revenue taxes, except where fraud can be shown on the part of the owner.

(11) That notwithstanding the fact that a fortifying room on the premises of a bonded winery is a bonded warehouse and taxes are not assessable or collectible on spirits contained therein lost by theft without fraud or recovery by the owner while in the custody of a revenue officer, the said John P. Carter, then Collector of Internal Revenue for the Sixth District of California, wrongfully and illegally exacted and collected from the plaintiff herein under color of the provisions of Section 600, Act approved February 24, 1919, (40 Stat., 1057) entitled "An Act to Provide Revenue and for Other Purposes", and demanded and required that the plaintiff involuntarily and under duress and compulsion pay to him on April 26, 1921, the sum of \$1,805.98, taxes due on 820.9 proof gallons of brandy at the rate of \$2.20 per gallon.

(12) That at said time and place the plaintiff served oral notice upon the defendant, John P. Carter, that said payment was made under duress and compulsion, and under protest solely for the purpose of avoiding the imposed penalties in said Act provided, and the restraint

of his goods, chattels and effects, reserving all his rights to recover said amount so illegally and erroneously assessed and collected; and that the assessment of said tax was illegal and void as against said plaintiff.

(13) That thereafter on or about April 28, 1921, the plaintiff presented and delivered to said John P. Carter a claim for refund of \$1,313.08, a portion of the \$1,805.98 taxes paid to him, for transmission to the Commissioner of Internal Revenue at Washington, D. C., which application was in conformity with the law and regulations governing such matters; that thereafter on or about July 6, 1923, the said Commissioner of Internal Revenue notified the said plaintiff that his claim had been disallowed and rejected on the grounds that the relief provisions of Section 5, Act of November 23, 1921 for losses of distilled spirits by theft from distillery bonded warehouses or other bonded warehouses was not applicable to losses of brandy by theft from the fortifying room on the premises of a bonded winery.

(14) That thereafter on or about July 18, 1923, the plaintiff presented and delivered to the Collector of Internal Revenue for the Sixth District of California, an amended claim for refund to be transmitted to the said Commissioner of Internal Revenue at Washington, in the full amount of the taxes paid (\$1,805.98) on the said nine barrels of distilled spirits stolen from said fortifying room; and that subsequent thereto, on or about June 12, 1924, said Commissioner notified the plaintiff that his amended claim and application for refund of the full amount of taxes so paid had been disallowed and rejected on the grounds aforesaid; and

said defendant, John P. Carter, as Collector of Internal Revenue, to whom said money was paid, by reason of the rejection and disallowance of said appeals and applications for refund by the Commissioner of Internal Revenue, refused and still refuses to refund to the plaintiff herein the whole or any part of said taxes so wrongfully and illegally exacted and collected from him.

WHEREFORE, the plaintiff herein demands judgment against the defendant for the sum of \$1,805.98, together with interest thereon from April 26, 1921, and for costs and disbursements herein.

Daniel J. Chapin

Attorney for Plaintiff.

STATE OF CALIFORNIA)
) ss.
 CITY AND COUNTY OF LOS ANGELES,)

JACOB BAUMAN, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action and has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters, he believes it to be true.

Jacob Bauman

Subscribed and sworn to before me this 1st day of August, 1924.

[Seal]

Fannie D. Medlar

Notary Public in and for the City and County of
 Los Angeles, State of California

My Commission Expires Oct. 29, 1924.

[Endorsed]: In law. No. 1804-M. In the District Court of the United States, in and for the Southern District of California Southern *District*. Jacob Bauman plaintiff, v. John P. Carter, Former Collector of Internal Revenue for the Sixth District of California, defendant. Bill of Complaint. Filed Aug. 2, 1924. Chas. N. Williams, clerk, by Edmund L. Smith, deputy clerk. Daniel J. Chapin, Attorney 301 I. W. Hellman Bldg.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN JUDICIAL DISTRICT OF CALIFORNIA.

JACOB BAUMAN, Plaintiff,)	
)	
vs.)	
)	
JOHN P. CARTER, Former Collector)	AT LAW
of Internal Revenue for the Sixth)	
District of California,)	
Defendant)	
)	

It is stipulated between Samuel W. McNabb, United States District Attorney and Assistant United States Attorney, Donald Armstrong, for said Southern District of California, attorneys for the Defendant, and Dan J. Chapin, Attorney for the Plaintiff:

First That John P. Carter, defendant herein, was the Collector of Internal Revenue for the Sixth District of California on November 15, 1920, and was such collector until March 6, 1922, and was such collector for more than four years prior thereto;

Second That Jacob Bauman, the plaintiff herein, was the proprietor of Bonded Winery Number five (5), located at Lankershim, Sixth District of California;

Third That said plaintiff, Jacob Bauman, had given bond to the United States, conditioned that he would comply with all laws and regulations respecting the production, fortification etc., of all wines produced, and account for all brandy used in fortification;

Fourth That said winery premises thus bonded included within the boundary thereof, a room known and designated as a fortifying room;

Fifth That there were stored in said winery premises on November 15, 1920, eight hundred and twenty and nine-tenths (820.9) taxable gallons of grape brandy.

Sixth That said brandy was placed in said bonded winery premises under the supervision of the defendant herein, or his duly authorized representatives;

Seventh That the only door to said fortifying room was secured by a Government lock, attached thereto by a Government officer, by direction of the defendant herein;

Eighth That the key to said lock was kept in the possession of the Government officer at all times;

Ninth That sometime during the early hours of the evening of November 15, 1920, the said door to the fortifying room on the bonded winery premises of the plaintiff, was forced open by parties unknown to either defendant or plaintiff and the brandy stolen therefrom;

Tenth That subsequent to the theft of said brandy, the then Commissioner of Internal Revenue, assessed taxes against the plaintiff, the said Jacob Bauman, in the amount of \$1805.98, alleged to be the tax due on said brandy stolen from the fortifying room on the bonded winery premises of Winery number five (5), Lanker-

shim, of which the plaintiff was proprietor, to-wit: 820.9 taxable gallons at \$2.20 per gallon, \$1805.98.

Eleventh That notice and demand was made by defendant herein on the plaintiff for the payment of said tax in the amount of \$1805.98 that distraint was threatened by said defendant, and that the amount was paid to said defendant, John P. Carter, under protest by the plaintiff.

Twelfth That the fortifying room from which the brandy was stolen was a part of the bonded winery premises of Winery number five (5) Lankershim on November 15, 1920.

Thirteenth That the 820.9 gallons of untax paid brandy was the property of the plaintiff herein stored in said fortifying room on said November 15, 1920, and that the brandy lost by theft on said date was without the collusion, fraud or negligence of any kind on the part of said plaintiff; and that said plaintiff has not been reimbursed for the loss of this brandy and has no legal remedy against any person from which he can recover the loss of the said brandy;

Fourteenth That said fortifying room on the Winery premises of bonded Winery number five (5) Lankershim, was constructed in conformity with the law and regulations applicable thereto;

Fifteenth That said room was under the joint control of the defendant herein and the store-keeper gauger,

assigned by the defendant to take charge of said fortifying room.

Donald Armstrong,
Assistant U. S. Attorney for Defendant.

Dan J. Chapin

Attorney for Plaintiff.

[Endorsed]: 1804 M. Jacob Bauman plaintiff, vs. John P. Carter, Collector, defendant. Stipulations. Filed February 2, 1926. Chas. N. Williams, clerk, by Louis J. Somers, deputy. Dan J. Chapin, attorney for plaintiff. Donald Armstrong, Asst. U. S. Atty, attorney for defendant.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA.
SOUTHERN DIVISION.

JACOB BAUMAN,)	
)	
)	Plaintiff
)	
Vs.)	Law No. 1804-M
)	
JOHN P. CARTER, Former Col-)	
lector of Internal Revenue for the)	
Sixth District of California.)	
)	
)	Defendant.

FINDINGS AND JUDGMENT

August 16, 1926.

This cause came on to be heard at this time and upon consideration thereof the Court made findings and judgments as follows:

Findings of Facts

I.

That the allegations of the complaint are true and were sustained by the facts.

II

That there is no issue of fact to be decided as the litigants filed a written stipulation of the facts.

III

That the only question to be decided is whether the fortifying room of a bonded winery is a "distillery or other bonded ware-house", within the meaning of Section 5 of the Willis-Campbell Act, same being conceded by briefs of counsel.

IV.

That if the brandy was taxable, the proper amount of tax was assessed and paid, a claim for abatement and refund duly made and rejected by Commissioner of Internal Revenue and defendant Collector.

Conclusions of Law.

I

That the Court has jurisdiction of the parties of this suit and of the subject matter thereof.

II.

That the part of Section 5 of the Willis-Campbell Act applicable to the case is as follows:

“If distilled spirits upon which the internal revenue tax has not been paid are lost by theft from a distillery or other bonded warehouse and it shall be made to appear to the Commissioner that such losses did not occur as the result of negligence, connivance, collusion or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act.”

III.

That a fortifying room on the premises of a bonded winery is a bonded ware-house within the meaning of Section 5 of the Willis-Campbell Act and falls within the category of “other bonded ware-house” referred to in said Act.

IV.

That plaintiff is entitled to recover from the defendant, John P. Carter, former Collector of Internal Revenue of the Sixth District of California, the sum of

\$1805.98 with interest from April 26, 1921 to August 16, 1926. Judgment to be entered accordingly, done this August 16, 1926.

Paul J. McCormick
United States District Judge.

Approved as to form.

Ames Peterson
Asst. U. S. Atty.

[Endorsed]: No. 1804-M. Law. U. S. District Court, Southern District of California, Southern Division. Jacob Bauman, plaintiff, vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California, defendant. Findings and Judgment. Filed Aug. 24, 1926. Chas. N. Williams, clerk, by L. J. Cordes, deputy clerk. Dan J. Chapin, 513 I. W. Hellman, Los Angeles, Cal.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA.
SOUTHERN DIVISION.

JACOB BAUMAN,)
)
 Plaintiff)
)
 VS.) No. 1804-M-Law.
)
 JOHN P. CARTER, Former Col-)
 lector of Internal Revenue for the)
 Sixth District of California,)
)
 Defendant.)

JUDGMENT

The issues in this action having been duly brought to trial before Honorable Paul McCormick, United

States District Judge, on August 16, 1926, and the Court having heard the allegations and proofs of the parties and after due deliberation having duly made its decision in writing in favor of the plaintiff and against the defendant with finding of fact and conclusions of law duly filed in the clerk's office of said Court.

Now, on said decision it is ordered, adjudged and decreed that the plaintiff, Jacob Bauman, recover of the defendant, John P. Carter, former Collector of Internal Revenue of the Sixth District of California, the sum of \$1805.98, with interest from April 26, 1921, to August 16, 1926. Judgment signed and entered this 25th day of August, 1926.

Chas. N. Williams,

CLERK.

[Endorsed]: United States District Court, Southern District of California Southern Division. Jacob Bauman, plaintiff vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California defendant. No. 1804 M- Law. Judgment. Filed Aug. 25, 1926. Chas. N. Williams, clerk, by L. J. Cordes, deputy clerk. Dan J. Chapin, 513 I. W. Hellman, Los Angeles, Cal.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN,)
Plaintiff,) Law No. 1804-M
vs)
JOHN P. CARTER, Former Col-)
lector of Internal Revenue for the)
Sixth District of California,)
Defendant.)

.....
.....
Daniel J. Chapin, Los Angeles, California, for Plaintiff.
Samuel W. McNabb, United States Attorney, and
Donald Armstrong, Assistant United States Attorney,
of Los Angeles, California, for Defendant.
.....
.....

MEMORANDUM OPINION.

This is an action at law wherein plaintiff sues defend-
ant as Collector of Internal Revenue to recover \$1805.98
with interest from April 26, 1921. Plaintiff was re-
quired to pay said principal amount as taxes due on
820.9 proof gallons of grape brandy, assessed at the
rate of \$2.20 per gallon under Section 600 of an Act
approved February 24th, 1919 (40 Stat. 1057). The pay-
ment was made involuntarily and under protest and
solely to avert the imposed penalties provided in said

Act and to avoid distraint of Plaintiff's property which was threatened by defendant. A claim for abatement and refund was duly made by plaintiff on the ground that the taxes were illegally collected, and as to the principal amount sued for herein the claim was disallowed and rejected by the Commissioner of Internal Revenue and by defendant Collector. The claim to refund was made, and this action was brought under Section 5 of an Act supplemental to the National Prohibition Act, known as the Willis-Campbell Act, (42 Stat. 222), and the part of said Act applicable to this case is as follows:

"If distilled spirits upon which the internal revenue tax has not been paid are.....lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the Commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act."

The litigants have filed a written stipulation of facts so that there is no issue of fact to be decided. It is

admitted that the brandy upon which the tax was assessed and collected was legally manufactured and lawfully deposited by plaintiff in a legitimate and authorized fortifying room on the premises of Bonded Winery No. 5 at Lankershim in the Sixth District of California. Plaintiff was the lawful proprietor of such bonded winery and premises as well as the lawful owner of such brandy. The brandy was securely placed and deposited in the fortifying room of the bonded winery premises on November 15th, 1920, and the only door to such fortifying room was securely locked by a regulation Government lock attached by an agent of the Government and by direction of defendant Collector, and the key to said door and fortifying room was kept by the Government officer at all times. Some time in the early hours of the evening of November 15th, 1920, after the fortifying room in which the brandy was deposited had been securely locked as aforesaid, the door thereof was forced open by parties unknown to either plaintiff or defendant, and the brandy deposited therein was stolen therefrom by parties unknown to either plaintiff or defendant. There is no intimation or contention that the theft and loss of the brandy was the result of negligence, connivance, collusion, or fraud of plaintiff in any manner. On the contrary, it is admitted that he was entirely innocent in the matter. No jurisdictional issue is raised by the parties.

The briefs of counsel concede that the only question for decision is whether the fortifying room of a bonded winery is a "distillery or other bonded warehouse"

within the meaning of Section 5 of the Willis-Campbell Act, (*supra*), and it is agreed that, if the brandy was taxable, the proper amount of tax was assessed and paid.

A fortifying room is an enclosed place on the premises of a bonded winery, designated and built under the supervision of the Commissioner of Internal Revenue and the Collector of Internal Revenue of the District in which such bonded winery is located for the deposit, storage, and use of brandy, when used to fortify wine, upon which the internal revenue tax has not been paid. The Government tax must be paid before the fortified wine leaves the fortifying room. Such a place is undoubtedly a "warehouse" according to common usage and meaning. Webster's New International Dictionary defines "warehouse" as "a storehouse for wares and goods; a receiving house." When broadly used, the term includes any structure used to store goods in. The term is specifically used respecting taxable and dutiable commodities when such are placed in the Government stores or bonded warehouses to be kept until the taxes or duties are paid.

The regulations of the Treasury Department further persuade one to the belief that fortifying rooms on bonded winery premises are regarded by the Government as store-rooms and warehouses. See Regulations 28, part I, Revision 1918, page 14, paragraph b. And an examination of the statutes relative to distillery warehouses (Section 3271, Revised Statutes) and a comparison with statutes authorizing, defining, and providing for the fortifying room in a bonded winery (Section 617, Act of February 24, 1919, 40 Stat. 1057) and also with

Sections 4 and 5 in Regulations 28, Part I, Revision 1918 of Treasury Department, clearly shows that the requirements, construction, control, and purposes of the fortifying room of a bonded winery are substantially the same as those of a distillery warehouse, and similar as well to the general and special bonded warehouses.

There is one paramount purpose and use common to all of such places, namely, that each of such places or depositaries are used for the storage of goods until the taxes are paid thereon. The mere fact that the brandy is mixed and intermingled with the wine in the fortifying room does not alter or destroy the storage or warehouse feature of such room. It is true that it is a place of manufacture but it is nevertheless a warehouse, because the wine and the brandy are stored therein before being mixed and intermingled, and the Treasury regulations expressly provide that the fortifying room is to be used as a warehouse or storeroom for all the brandy necessarily left over after fortification has taken place. There is no substantial difference, in so far as storage use is concerned, between distillery warehouses and fortifying rooms in bonded wineries. Section 24 of Regulations 28, Part I, Revision 1918, page 43, of the Treasury Department, furnish additional strong reasons to believe that the Internal Revenue branch of the Government considers the fortifying room as a bonded warehouse for the storage of brandy to be used in fortifying wine when it provides for the abatement of taxes when such brandy is lost through casualty while in the custody of the officers of the Internal Revenue, which is always

the case when the brandy is on lawful deposit in the fortifying room.

I have not been cited to any adjudication wherein the precise question for decision in this case has been considered, and an independent investigation has disclosed no applicable judicial precedent. The true test as to whether a warehouse is bonded appears to be as to whether the Government has taken control of the storehouse or warehouse and exercises dominion over the premises. See *United States vs. Powell*, 14 Wallace 493. The fortifying room of the bonded winery involved in this action, at the time the brandy was stolen and lost, was under the control of the government for the sole purpose of insuring, facilitating, and enforcing the payment of taxes due on the brandy that had been lawfully deposited therein under the supervision and direction of the Government. These facts and circumstances constitute such fortifying room nothing less or different than a bonded warehouse within the meaning of Section 5 of the Willis-Campbell Act, (*supra*). And, as has been already suggested, the fortifying room has all the essential marks of a distillery warehouse. But, assuming, without admitting, that there is a real distinction between a distillery warehouse referred to in Section 5 of the Willis-Campbell Act and the fortifying room of a bonded winery, nevertheless the fortifying room clearly falls within the category of "other bonded warehouse" referred to in said act.

I am unable to agree with the Government's contention that the only warehouses referred to in the Act in ques-

tion, under the phrase "other bonded warehouse," are the special and general warehouses provided for by the Act of March 3, 1877, as amended (19 Stat. 335), pages 251 and 252 of the Compilation of Internal Revenue Laws of 1920, and Sections 51 and 52 of the Act of August 27, 1894 (28 Stat. 509), for it would appear that Congress has provided that manufacture may be carried on upon the premises of a bonded warehouse and to a much greater extent than in a fortifying room and the place of manufacture still remain a warehouse. See Denatured Alcohol Act of June 7, 1906 (34 Stat. 1250); Bottle in Bond Act of March 3, 1897 (29 Stat. 626); and the Amendment to Section 3221, Revised Statutes, by Section 6, Act of March 1, 1879 (20 Stat. 327), applying to losses of spirits in cistern rooms of distilleries. All of these statutes provide for allowances of losses by casualty of spirits stored in these places in accordance with the provisions of Section 3221, Revised Statutes.

In the Statutes relating to the establishment of the various depositaries and places referred to in these Acts of Congress, the same precautions and requirements are found as exist in the laws establishing distillery warehouses or special or general bonded warehouses. The same general requirements as to construction, supervision, and control by the Government appears in all of these laws, just as it appears in the Statutes respecting the establishment and maintenance of fortifying rooms on bonded winery premises, and no reason is apparent to

me why a loss by casualty in a fortifying room should not have the benefit of the remedial provisions for the exemption from tax and penalty contained in Section 5 of the Willis-Campbell Act, (*supra*).

Findings and judgment for the amount sued for, together with interest, are ordered for plaintiff, and counsel for plaintiff will prepare same in accordance with the Rules of this Court.

Dated August 16th, 1926.

Paul J. McCormick,
United States District Judge.

[Endorsed]: No. 1804-M. Law. U. S. District Court, Southern District of California, Southern Division. Jacob Bauman, plaintiff, vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California, defendant. Memorandum Opinion. Filed August 16th, 1926. Chas. N. Williams, clerk by Louis J. Somers, deputy.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN,)
) Law No. 1804-M
Plaintiff)
vs.)
) PETITION
JOHN P. CARTER, Former Col-) FOR WRIT OF
lector of Internal Revenue for the) ERROR.
Sixth District of California.)
)
Defendant.)
)

TO THE HONORABLE PAUL J. McCORMICK, Judge of said Court:

Now comes the defendant, John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, by Samuel W. McNabb and Donald Armstrong, his attorneys, and feeling himself aggrieved by the final judgment of this court entered against him and in favor of Jacob Bauman, on the 25th day of August, 1926, hereby prays that a writ of error may be allowed to him from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Southern District of California, and in connection with this petition, petitioner hereby presents his assignments of error.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of this cause.

SAMUEL W. McNABB,
United States Attorney,
Donald Armstrong,
DONALD ARMSTRONG,
Assistant United States Attorney.
Attorneys for Defendant and
Plaintiff in error.

[Endorsed]: No. 1804-M In the District Court of the United States for the Southern District of California Southern Division Jacob Bauman vs. John P. Carter, Former Collector of Internal Revenue for the Sixth District of California. Petition for Writ of Error. Filed Nov. 15, 1926 Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN,)	
)	
Plaintiff and Defendant)	Law No. 1804-M
in Error,)	
)	
vs.)	
)	ASSIGNMENT
JOHN P. CARTER, Former Col-)	OF ERRORS.
lector of Internal Revenue for the)	
Sixth District of California,)	
Defendant, and Plaintiff)	
in Error.)	

Now comes the plaintiff in error by Samuel W. McNabb and Donald Armstrong, his attorneys, and in connection with his petition for a writ of error says that in the record, proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

I.

That the court erred in not entering judgment for the plaintiff in error herein upon the agreed statement of facts and upon the facts as found by the court in its findings of fact.

II.

That the conclusions of law as made by the court are not supported by the findings of fact.

III.

That the judgment as entered herein is contrary to law.

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed.

Dated: Los Angeles, California, this 15th day of November, 1926.

SAMUEL W. McNABB,
United States Attorney.
Donald Armstrong,
DONALD ARMSTRONG
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

We hereby certify that the foregoing assignment of errors is made in behalf of the plaintiff in error hereinabove named, for a writ of error and is in our opinion, and the same now constitutes the assignment of errors upon the writ prayed for.

SAMUEL W. McNABB,
United States Attorney.
Donald Armstrong,
DONALD ARMSTRONG
Assistant United States Attorney.
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1804-M. In the District Court of the United States, for the Southern District of California, Southern Division. Jacob Bauman, vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California. Assignment of Error. Filed Nov. 15, 1926. Chas. N. Williams, clerk, by Edmund L. Smith, deputy clerk.

UNITED STATES OF AMERICA
 District Court of the United States
 SOUTHERN DISTRICT OF CALIFORNIA
 Southern Division

Jacob Bauman <p style="text-align: right;">Plaintiff,</p>	}	Clerk's Office
vs.	}	No. 1804 M
JOHN P. CARTER <p style="text-align: right;">Defendant.</p>	}	Defendant and Plaintiff in Error's Praecipe for record

TO THE CLERK OF SAID COURT:

Sir:

Please prepare the following record on appeal in the above entitled case:

1. Copy of the Complaint filed in said case;
2. Copy of the Answer filed in said case.
3. Copy of the Stipulation of facts entered into by and between the parties in said case;
4. Findings of Fact found by the Court in said case;
5. Conclusions of Law in said case;
6. The Judgment of the court in said case;
7. Notice of Entry of Judgment in said case;
8. The Petition for Writ of Error in said case;

9. The Assignment in Error in said case;
10. The citation issued in said case.
11. The Writ of Error issued in said case.

Respectfully submitted

S. W. McNabb

U. S. Attorney

Donald Armstrong

Asst. U. S. Attorney

Attorneys for Def & Plf in Error

[Endorsed]: No. 1804 M. U. S. District Court Southern District of California Jacob Bauman plaintiff vs. John P. Carter defendant. Praeipie for Record on Appeal in above case. Received copy of the within praeipie this——day of January, 1927. Dan J. Chapin Attorneys for plaintiff and defendant in error. Filed Jan. 3, 1927 R. S. Zimmerman clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN,)	
	Plaintiff,)	
-vs-)	
)	
JOHN P. CARTER, Former Col-)	CLERK'S
lector of Internal Revenue for the)	
Sixth District of California,)	CERTIFICATE.
)	
Defendant.)		

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 32 pages, numbered from 1 to 32 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error and order allowing writ of error, bill of complaint, stipulation, findings and judgment, judgment, opinion, petition for writ of error, assignment of errors, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to..... and that said amount has been paid me by the plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-seven and of our Independence the One Hundred and Fifty-first.

R. S. ZIMMERMAN,
Clerk of the District Court of the
United States of America, in
and for the Southern District
of California.

By

Deputy.